

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Sawyer, P.J., and Neff and White, JJ.

PEOPLE OF THE STATE OF MICHIGAN,)	SUPREME COURT FILE
)	NO. 133474
Plaintiff-Appellee,)	
)	COURT OF APPEALS FILE
vs)	NO. 263392
)	
DENNIS MERVYN SARGENT)	ALLEGAN COUNTY CIRCUIT COURT
)	NO. 04-13744-FC
Defendant-Appellant,)	
)	

THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN
Amicus Curiae Brief
IN SUPPORT OF PLAINTIFF-APPELLEE
THE PEOPLE OF THE STATE OF MICHIGAN

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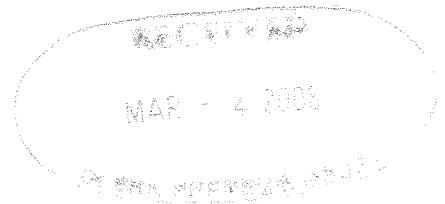


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STATEMENT OF APPELLATE JURISDICTION

The Prosecuting Attorneys Association of Michigan, Amicus Curiae, join in the Statement of Appellate Jurisdiction provided by Plaintiff-Appellee, the People of the State of Michigan.

STATEMENT OF FACTS

[In Arguments of this Brief, references to “Plaintiff” refers to Plaintiff-Appellee. References to “Defendant” refer to Defendant-Appellant.]

The Prosecuting Attorneys Association of Michigan, Amicus Curiae, join in the Statement of Facts provided by Plaintiff-Appellee, the People of the State of Michigan.

STATEMENT OF QUESTIONS INVOLVED

I

THE LEGISLATURE DEFINED A "VICTIM" FOR OV 9 SCORING PURPOSES AS "EACH PERSON PLACED IN DANGER OF INJURY OR LOSS OF LIFE." MCL 777.39. IN *PEOPLE V CHESEBRO*, 206 MICH APP 468 (1994), THE COURT OF APPEALS LIMITED THE TERM "VICTIM" TO ONLY THOSE PERSONS AFFECTED BY THE SENTENCING OFFENSE. SHOULD THIS COURT OVERRULE *CHESEBRO* BECAUSE IT CONTRADICTS THE PLAIN LANGUAGE OF MCL 777.39?

Amicus Curiae Answer: "YES"

ARGUMENT I

THE LEGISLATURE DEFINED A "VICTIM" FOR OV 9 SCORING PURPOSES AS "EACH PERSON PLACED IN DANGER OF INJURY OR LOSS OF LIFE." MCL 777.39. IN *PEOPLE V CHESEBRO*, 206 MICH APP 468 (1994), THE COURT OF APPEALS LIMITED THE TERM "VICTIM" TO ONLY THOSE PERSONS AFFECTED BY THE SENTENCING OFFENSE. THIS COURT SHOULD OVERRULE *CHESEBRO* BECAUSE IT CONTRADICTS THE PLAIN LANGUAGE OF MCL 777.39.

A. STANDARD OF REVIEW

Issues concerning the application and interpretation of the Legislative Sentencing Guidelines are questions of law that this Court reviews de novo.¹ "When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature. We begin by construing the language of the statute itself. Where the language is unambiguous, we give the words their plain meaning and apply the statute as written."² Every word or phrase of a statute should be given its commonly understood meaning.³ "[T]he Legislature is presumed to be aware of the consequences of the use, or omission, of language when it enacts the laws that govern our behavior."⁴

B. THE PLAIN LANGUAGE OF MCL 777.39 ALLOWS SCORING FOR OTHER VICTIMS, NOT JUST VICTIMS OF THE SENTENCING OFFENSE.

The statutory language of MCL 777.39 is clear. It does not limit scoring of Offense Variable (OV) 9 only to victims of the sentencing offense. The statute contains broad language permitting victims of other offenses committed by a defendant to be scored. The version of

¹ *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

² *Id.* (Citing, *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999)).

³ *People v Webb*, 458 Mich 265, 273-274; 580 NW2d 884 (1998) (Citing, *Western Michigan Univ. Bd. of Control v. Michigan*, 455 Mich. 531, 539, 565 N.W.2d 828 (1997); MCL § 8.3a).

⁴ *People v Ramsdell*, 230 Mich App 386, 392; 585 NW2d 1 (1998).

MCL 777.39 in effect when Defendant was sentenced in May 2005⁵ stated:

(1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- (a) Multiple deaths occurred 100 points
- (b) There were 10 or more victims 25 points
- (c) There were 2 to 9 victims 10 points
- (d) There were fewer than 2 victims 0 points

(2) All of the following apply to scoring offense variable 9:

- (a) Count **each person** who was placed in danger of injury or loss of life as a victim.
- (b) Score 100 points only in homicide cases. (Emphasis added).

Had the Legislature intended that only victims of the sentencing offense be included, it could have done so by specifically stating that in the statute. The fact that the statute contains no such statement supports a conclusion that the term "victim" is not limited to only the victim of the sentencing offense, but may include other victims as well. The broad definition used by the Legislature demonstrates its intent that victims outside the sentencing offense be accounted for.

The term "victim" is not defined in the legislative guidelines. Black's Law Dictionary defines "victim" as "[a] person harmed by a crime, tort or other wrong,"⁶ By directing a court to count each person who was placed in **danger** of injury, MCL 777.39(2)(a) expands the ordinary meaning of the term "victim" to include not only those who suffer actual harm, but also those placed in danger of suffering harm. By including such language, the Legislature directed trial courts to include persons who were placed in **danger** of injury in addition to those more commonly understood as a victim, someone who has **suffered actual injury** or loss. The result is that both the actual and potential harm of the defendant's **conduct** is scored.

MCL 777.39 was amended by 2006 PA 548 (effective March 30, 2007) to further expand the definition of victim to include those who were placed in danger of property loss. This

⁵ As later discussed, MCL 777.39 was amended effective March 30, 2007.

⁶ Black's Law Dictionary (7th ed), p 1561.

amendment is additional evidence of the Legislature's intent that the definition of victim be broad.

The Michigan Sentencing Guidelines Manual Makes It Clear That the Offense Variables Look At All of the Offender's Conduct, Not Just the Sentencing Offense.

The Michigan Sentencing Guidelines Manual supports the conclusion that the definition of victim is broad. Though the Manual is not law and the statute is controlling authority, the Manual does provide helpful guidance. The Michigan Sentencing Guidelines Manual states that the offense variables address specific sentencing characteristics:

Each OV consists of several statements to which a specific number of points are assigned. The statements appearing in each OV quantify the specific sentencing **characteristic** addressed by that OV. Determine which one or more of the statements addressed by the OV apply to the **offender** and assign the point value indicated by the applicable statement with the highest number of points. Where no General Information and Instructions points are appropriate for a particular OV, a score of zero (0) should be indicated. The total number of points assessed for all OVs is the offender's "OV level" and corresponds to the vertical axis of the appropriate sentencing grid.⁷

This language makes it clear that it is not just the **offense** that the offense variables are designed to measure, but the conduct of the **offender** as well. Thus, looking outside the sentencing offense to account for victims is proper.

Based on the plain language of the statute and the instructional language of the Sentencing Guidelines Manual, it is clear that the offense variables are not limited to only the facts in the sentencing offense. The offense variables are more properly viewed as a measure of the offender's conduct as well. Nothing in the language of the statute limits scoring to only conduct involved in the offense.

⁷ Michigan Sentencing Guidelines Manual (2007 ed), 2-3. (Emphasis added).

C. **CHESEBRO PERTAINED TO THE JUDICIAL GUIDELINES, NOT THE LEGISLATIVE GUIDELINES. APPLICATION OF THE HOLDING OF *PEOPLE v CHESEBRO* TO THE LEGISLATIVE GUIDELINES IGNORES THE LEGISLATURE'S INTENT.**

When the court in *People v Chesebro*⁸ considered whether victims outside those endangered in the sentencing offense could be scored under the guidelines, the court analyzed the judicial sentencing guidelines. The *Chesebro* decision is inconsistent with the plain language of the Legislative Guidelines and should not be followed.

As noted by the court in *Chesebro*, the offense variables were defined as being specific to the offense:

We begin by looking at the definition of “offense variable” contained in the sentencing guidelines. The definitions section defines “offense variable” as being the factors “that are used to evaluate the seriousness of the offense.” Thus, the **primary focus of the offense variables is not to measure the offender, but to measure the offense.**⁹

That narrow definition is not contained in the legislative guidelines and should not be used to limit scoring of OV 9. Such a limitation ignores the plain language of the statute. Contrary to the court’s conclusion in *Chesebro*, the Michigan Sentencing Guideline Manual makes it clear that offense variables of the Legislative Guidelines account for the **offender’s conduct**, and are not just a measure of the specific sentencing offense.

The court in *Chesebro* held that based on the judicial guidelines, “the offense variables are to be scored **only** with respect to the specific transaction that gives rise to the conviction for which the defendant is being sentenced unless the instructions for a variable specifically and explicitly direct the trial court to do otherwise.”¹⁰ Nothing in the current language of MCL 777.39 limits OV 9 to the specific criminal transaction that gave rise to the conviction. To read

⁸ 206 Mich App 468; 522 NW2d 677 (1994)

⁹ *Id.* at 470. (Emphasis added).

¹⁰ *Chesebro*, 206 Mich App at 471-472. (Emphasis added).

such a requirement into the statute ignores the plain language used by the Legislature.

The court in *Chesebro* reasoned that if the Legislature specifically intended for actions outside the scope of the offense to be considered, the Legislature would have stated so.¹¹ The court cited examples such as Judicial OV 8, continuing pattern of criminal behavior, and OV 25, contemporaneous criminal acts. Though similar offense variables exist in the current Legislative version of the guidelines, specifically OV 12 and OV 13, reading them as a limitation on scoring victims outside the sentencing offense is error. Those variables are simply instances where the Legislature wanted to **insure** that specific conduct is **included**. An inclusion of specific conduct does not equate to an exclusion of other conduct. Were that the intent, the Legislature would have specifically stated that only the victim of the sentencing offense can be scored. It did not do so.

Chesebro is at odds with the plain statutory language of the current Legislative Guidelines. To apply the analysis used in *Chesebro* to the current guidelines would preclude the scoring of “victims” that the Legislature intended to account for.

D. GULLETT: ANOTHER MISAPPLICATION OF CHESEBRO TO THE LEGISLATIVE GUIDELINES.

*People v Gullett*¹² is the most recent example of the application of *Chesebro*. The court did not address whether *Chesebro* was still valid under the Legislative Guidelines.¹³ But the court’s application of *Chesebro* was error.

In *Gullett*, the defendant pleaded no contest to one count of CSC I involving a 10-year old victim.¹⁴ Other charges, including one of gross indecency involving that victim’s brother

¹¹ *Id.*

¹² 277 Mich App 214; ___ NW 2d ___ (2007)

¹³ *Id.*

¹⁴ *Id.*

and her 12-year old friend, were dismissed.¹⁵ In a separate case, the defendant pleaded guilty to another count of CSC I involving the 12-year old friend.¹⁶ For the CSC I count involving the 10-year old, the trial court scored 10 points for OV 9 indicating there were two to nine victims.¹⁷ Points were not scored for OV 9 on the defendant's other case.¹⁸ The trial court decided that the gross indecency charge that was originally included in the 10-year old's case involved all three victims. Thus the points were appropriate.¹⁹ Relying in part on *Chesebro* and statutory language, the Court of Appeals vacated the defendant's sentence.²⁰

The Court of Appeals concluded *Chesebro* stood for the proposition that "the calculation of victims was limited to **those victims involved in the specific transaction** that gave rise to the particular conviction for which the sentence is being imposed."²¹ Accordingly, the Court of Appeals determined that the only victim properly counted was the 10-year old victim. While the court's interpretation of *Chesebro* is correct, application of *Chesebro* to the current Legislative Guidelines was error.

Contrary to the Court of Appeals' Conclusion in *Gullett*, MCL 777.21 Does Not Limit Scoring to the Sentencing Offense.

In *Gullett*, the Court of Appeals based its holding on MCL 777.21(3), which directs the scoring for habitual offenders. It states: "If the offender is being sentenced under section 10, 11 or 12 of chapter IX, determine the offense category, offense class, offense variable level, and prior record variable level **based on the underlying offense**."²² Relying on the "underlying

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (Emphasis added).

²² MCL 777.21(3) (Emphasis added).

offense” language, the Court of Appeals concluded offense variables are correctly calculated only for the sentencing offense, and no other offenses, as the phrase “based on the underlying offense” limits the term “offense variables”. This rationale is not consistent with the remainder of MCL 777.21.

The court’s logic would mean that the phrase “based on the underlying offense” limits the remaining terms of the sentence. One of the terms is prior record variable. The prior record variables could never be determined based **solely** on the underlying offense. Such a result is illogical. Prior record variables take into account a defendant’s past crimes. Thus the phrase “based on the underlying offense” could not conceivably limit scoring of the prior record variables to the sentencing offense. Yet, that is the result mandated by the court’s rationale. The Court of Appeals interpretation of the phrase “based on the underlying offense” as a limitation to the remainder of the sentence is illogical when MCL 777.21(3) is read in its entirety.

The court also failed to read MCL 777.21(3) in context with the remainder of the statute. The scoring of **non**-habitual offenders is also explained by MCL 777.21. MCL 777.21(1) does not contain the same language the Court of Appeals viewed as restrictive:

(a) Find the offense category for the offense from part 2 of this chapter. From section 22 of this chapter, determine the offense variables to be scored for that offense category and score only those variables for the offender as provided in part 4 of this chapter. Total those points to determine the offender’s offense variable level.

(b) Score all prior record variables for the offender as provided in part 5 of this chapter. Total those points to determine the offender’s prior record variable

(c) Find the offense class for the offense from part 2 of this chapter, Using the sentencing grid for that offense class in part 6 of this chapter, determine the recommended minimum sentence range from the intersection of the offender’s

offense variable level and prior record variable level. The recommended minimum sentence within a sentencing grid is shown as a range of months or life.²³

There is no language in this instruction that limits the scoring solely to “underlying offense”.

Likewise MCL 777.21(2), pertaining to multiple offenses, contains no such limitation. That part of the statute states: “If the defendant was convicted of multiple offenses, subject to section 14 of chapter XI, score each offense as provided in this part.”²⁴

The Legislature could not have intended that the guideline scoring for habitual offenders and first-time offenders be calculated by different methods. It is more likely that the Court of Appeals erred in its interpretation of MCL 777.21(3) and the phrase “based on the underlying offense”. When MCL 777.21 is read as a whole, the Legislature’s intent is clear: the “underlying offense” is simply the starting point from which one determines **which offense class** the sentencing crime falls into, and thus which offense variables **apply**. It is not a limitation that only conduct from the sentencing offense can be considered.

E. CHSESEBRO AND GULLETT ARE INCONSISTENT WITH THIS COURT’S HOLDING IN PEOPLE v MORSON.

The holding in *Gullett*, and the application of *Chesebro* to the Legislative Guidelines is inconsistent with precedent from this Court. In *People v Morson*, a majority of this Court held that scoring of OV 9 was not limited to the sentencing offense.²⁵ Rather, OV 9 was properly scored for two victims where defendant pleaded guilty to one count and another offense involving a another victim from the same criminal episode was dismissed.²⁶ This Court did not limit scoring to only the victim of the sentencing offense.

²³ MCL 777.21(1)(a).

²⁴ MCL 777.21(2)

²⁵ 471 Mich at 263.

²⁶ *Id.*

In *Morson*, four Justices of this decided OV 9 is properly scored for a person who is not the victim of the sentencing offense.²⁷ One Justice concurred in the result, but reasoned that scoring was proper because armed robbery is a transactional offense and the second victim “was placed in danger of injury or loss of life while the robbery was ongoing.”²⁸

Limiting OV 9 to transactional offenses is not required by the plain language of the statute. Nothing in MCL 777.39, requires a victim to be part of the criminal transaction in order to be scored. Furthermore, in many criminal cases, such a limitation would prevent scoring victims the Legislature intended to include.

In the Sargent case, now before the Court, such a limitation would prevent scoring two people who were clearly established as victims. Each of the victims testified to sexual assaults they suffered at the hands of the Defendant. Defendant, Sargent, had a clear pattern of **ongoing** behavior that continued over a period of time. Under the plain language of MCL 777.39, the two girls who testified were properly scored as “victims” because they were placed in danger of injury by Defendant sexually assaulting them. While criminal sexual conduct is not a transactional offense, the Defendant’s behavior had no less impact on the victims than an armed robbery has on its victims. The Legislature did not intend for victims of an armed robbery to be treated differently than victims of criminal sexual conduct, yet that is the result if a transactional approach to scoring OV 9 is required.

F. THE SENTENCING GUIDELINES ALLOW SCORING VICTIMS OF OTHER OFFENSES.

Criminal offenses can be ongoing, or episodic, yet not transactional. This is especially true in cases involving sexual assaults of children, child abuse, and possession of child

²⁷ *Id.*

²⁸ *Id.* at 270.

pornography. The nature of these cases is such that they often go on for years before being reported. The Legislature did not intend for defendants to get a scoring break because of the fact that they continued to commit crimes for a long period of time. Yet by failing to count victims outside the sentencing offense, that is the result. Crimes such as CSC, and other assaultive crimes rarely have more than one victim per count as they are personal in nature. Yet these crimes also involve some of the most dangerous defendants.

There many types of crimes where a defendant commits numerous criminal acts over a period of time. For example, a defendant may commit multiple home invasions, armed robberies, breaking and enterings or financial crimes with different victims and at different points in time. Limiting OV 9 scoring to the sentencing offense or a transactional approach would mean that in that type of case, the full scope of a defendant's conduct is not considered.

This is especially true, where the defendant has pleaded guilty pursuant to an agreement where other charges will be dismissed. Those other charges are never scored and those victims left uncounted. The Sentencing Guidelines allow a court to consider **all** other victims when scoring OV 9. Those people are no less "victims" even though the defendant pleaded guilty to another criminal charge rather than theirs. Likewise, even if a defendant were acquitted of an offense with respect to one victim and convicted on another, scoring of the acquitted offense would not be precluded.²⁹ As long as a preponderance of the evidence establishes a person as a victim, MCL 777.39 allows scoring. It should be the same case with uncharged conduct. So long as a preponderance of the evidence establishes the person is a victim, OV 9 is properly scored.

²⁹ See, *People v Ewing*, 435 Mich 443, 451-453; 458 NW2d 880 (1990).

Limiting scoring of OV 9 to conduct of the sentencing offense defeats the intent of the Legislative Guidelines to individualize sentences based on the offense and the **offender**. It will also frustrate the purpose of consistency in sentencing. If the guideline scoring fails to account for all victims, a court would have substantial and compelling reasons to deviate.

Defendants may argue scoring OV 9 for other crimes would be **unlimited**. This is **not** the case. Common sense dictates that crimes wholly unrelated to a defendant's conduct in would not be scored. But no bright-line rule should be adopted. The trial courts should be allowed to decide which other conduct and victims should be scored, based on the evidence presented. This result is consistent with the statutory language.

Limiting the scoring of OV 9 for only the sentencing offense is not required by the statute. It was not intended by the Legislature. It only serves to reward defendants who have committed numerous crimes by treating a defendant who victimized numerous people the same as a defendant who victimized one person. A pedophile with dozens of victims would be treated no differently than someone who sexually assaulted one child. Likewise a defendant who possessed one count of child pornography would be treated the same as a defendant who possessed 300 counts. Defendants should be held accountable when they have victimized numerous people by facing the possibility of a harsher sentence. That is the clear intent of the Legislature evidenced by the broad description of "victim" adopted. That is why the Legislature ordered greater points assessed for 10 victims than for two victims. This Court should not limit scoring of OV 9 to the sentencing offense and frustrate the Legislature's intent to more severely punish those who victimize numerous people.

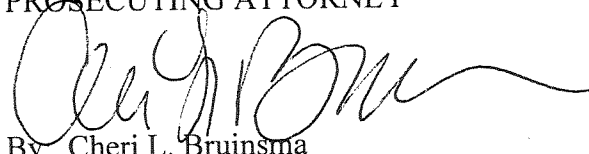
RELIEF REQUESTED

This Court should overrule *People v Chesebro* because its holding is contrary to the plain language of MCL 777.39. Based the statute, scoring of OV 9 is not limited to the sentencing offense. The trial court in this matter properly scored OV 9. The Court of Appeals decision affirming Defendant's sentence and conviction should be affirmed.

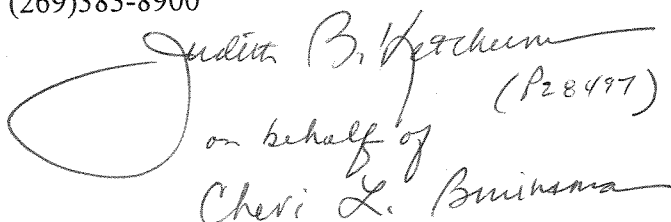
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